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Supreme Court, U.S.
FILED

No. 101023

FEB 10 2011

OFFICE OF THE CLERK

In The

Supreme Court of the United States

DAVID C. TABB, pro se,

Petitioner,

vs.

MARY R. BORDIER, Assessor of
Jefferson County, West Virginia,

Respondent.

**On Petition For A Writ Of Certiorari
To The Circuit Court Of
Jefferson County, West Virginia**

PETITION FOR A WRIT OF CERTIORARI

DAVID C. TABB, Pro se petitioner
107 Tabb Lane
Harpers Ferry, WV 25425

QUESTIONS PRESENTED FOR REVIEW

1. Were the actions of the Circuit Court of Jefferson County, West Virginia and thereafter the West Virginia Supreme Court of Appeals a violation of Petitioner's Fifth Amendment right to Due Process of Law when the Circuit Court dismissed without a hearing Petitioner's appeal of the decision of the Jefferson County Commission sitting as a Board of Review and Equalization, which decision increased Petitioner's 2008 Real Estate Tax Assessment, and thereafter when the Supreme Court declined to exercise its discretionary review of said Circuit Court order dismissing Petitioner's appeal?

2. Was it a violation of Petitioner's Fifth Amendment right to due process of law for the Circuit Court of Jefferson County to refuse Petitioner an opportunity to present evidence at an evidentiary hearing as to the reasons why he was unable to attach to his Petition for Appeal the record of the hearing that was conducted before the Jefferson County Commission sitting as a Board of Review and Equalization; at which time Petitioner intended to offer evidence that he was unable to attach to the Petition for Appeal, the record below because of intentional interference by agents of the State of West Virginia making it impossible to compile and attach said record to his petition?

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CITATIONS OF THE OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS ENTERED IN THE CASE BY COURTS OR ADMINISTRATIVE AGENCIES

A. Letter of **February 19, 2008** informing Petitioner that no change in appraised values "should be made at this time."

B. Order of **May 12, 2008** from the Circuit Court of Jefferson County West Virginia in Case No. 08-C-121 styled Shenandoah Sales & Service, Inc. Petitioner v. Mary R. Bordier, Respondent.

C. Order of **June 19, 2008** from the Circuit Court of Jefferson County West Virginia in Case No. 08-C-121 styled Shenandoah Sales & Service, Inc. Petitioner v. Mary R. Bordier, Respondent.

D. Order of **July 10, 2008** from the Circuit Court of Jefferson County West Virginia in Case No. 08-C-121 styled Shenandoah Sales & Service, Inc. Petitioner v. Mary R. Bordier, Respondent.

E. Orders of **June 2, 2010** and **October 13, 2010** from the West Virginia Supreme Court of Appeals denying Petitioner's petition for appeal and there after Petitioner's motion for reconsideration.

STATEMENT OF THE BASIS OF JURISDICTION

A. Petitioner submits that pursuant to Rule 13.1 and 28 U.S.C. § 1257 this court has jurisdiction to consider Petitioner's petition for Certiorari from the judgment order of the West Virginia Supreme Court of Appeals of June 2, 2010 denying Petitioner's petition for appeal and the judgment order of the West Virginia Supreme Court of Appeals dated October 13, 2010 denying Petitioner's Motion for Reconsideration.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THIS CASE

A. Fifth Amendment United States Constitution

B. West Virginia Code 11-3-25

These provisions are set out in the appendix to this petition.

STATEMENT OF THE CASE

A. Facts Material to Consideration of the Questions Presented

1. On the 12th day of February, 2008 Petitioner appeared before the Jefferson County Commission acting in the capacity of a State/County Board of Review and Equalization.

2. The purpose of the hearing before the Jefferson County West Virginia Commission acting in the capacity of a Board of Review and Equalization was to determine whether the tax assessment for the calendar year 2008, increasing Petitioner's assessment from the 2007 Assessment of $259,200 dollars to the 2008 Assessment of $499,000 dollars was conducted properly and the assessment calculated correctly.

3. Petitioner says at the conclusion of the hearing regarding his appeal to the Jefferson County Commission acting as a Board of Review and Equalization of the increase real estate tax assessment in the amount of $239,800, said assessment was upheld and his appeal denied.

4. Petitioner says that he timely filed a Petition for Review of said decision by the Jefferson County Commission acting in the capacity of a Board of Review and Equalization, pursuant to West Virginia Code § 58-3-4; and § 11-3-25.

5. Petitioner says that his petition for Review and Appeal to the Circuit Court of Jefferson County, from the decision of the Jefferson County Commission acting in the capacity of a Board of Review and Equalization, was denied and refused without a hearing on the merits of his appeal and same further was denied by the West Virginia Supreme Court of

Appeals on both June 2, 2010 and October 13, 2010.

6. Petitioner says he was denied a hearing on the merits of his appeal both in the Circuit Court of Jefferson County, the forum for a direct appeal from the decision of the Jefferson County Commission acting as a Board of Review and Equalization, and the West Virginia Supreme Court, the forum for a direct appeal from the denial of his right to a hearing in the Circuit Court of Jefferson County from the original adverse decision of the Jefferson County Commission acting as a Board of Review and Equalization.

7. Petitioner says in the Circuit Court of Jefferson County, the Respondent Jefferson County Tax Assessor, argued to the Circuit Court that Petitioner's petition for review to the Circuit Court of Jefferson County should be summarily denied because Petitioner failed to included as an attachment to said petition for Review the record from the hearing before the Jefferson County Commission acting as a Board of Review and Equalization.

8. Petitioner says that he has never been permitted the opportunity to demonstrate factually by evidence that he was deprived of and denied the opportunity i.e. that it was **impossible** for him to attach to and include with the petition for review filed in the Circuit Court of Jefferson County the record from the

hearing before the Jefferson County Commission acting as a Board of Review and Equalization because of the intentional and concerted efforts by the Respondent and agents for the State of West Virginia who willfully obstructed and interfered with Petitioner's efforts to obtain the record of hearing before the Jefferson County Commission acting as a Board of Review and Equalization.

9. Petitioner says the West Virginia Supreme Court of Appeals, a state court of last resort denied to him a hearing upon his appeal from the decision of the Jefferson County Circuit County entered on the 10th day of July, 2010 when it denied to him a hearing and dismissal of his appeal from the decision of the Jefferson County Commission acting as a Board of Review and Equalization.

10. Petitioner said it is the denial to him of a hearing in either court from the original decision of the Jefferson County Commission acting as a Board of Review and Equalization upon which Petitioner bases his argument that he has been denied due process of the law, thus depriving the Petitioner of the opportunity to offer evidence that the actions of the Respondent and agents of the State of West Virginia were a willful, intentional concerted effort to make it **impossible** for your Petitioner to comply

with either West Virginia Code § 58-3-4 or West Virginia Code § 11-3-25.

B. Stage in the Proceedings in Circuit Court When Federal Question Sought to be Reviewed was Raised

The above stated federal question was first raised in the Circuit Court of Jefferson County, West Virginia at the hearing conducted on May 12, 2008 before the Honorable Thomas Steptoe, Jr. when the State of West Virginia informed the Court it intended to challenge Petitioner's right to appeal to the Circuit Court of Jefferson County the ruling of the Jefferson County Commission sitting as a Board of Review and Equalization by moving to dismiss the appeal and decline to conduct a hearing as requested by Petitioner.

Hearing TR May 12, 2008

> *"THE COURT: I understand you have a motion. You'll probably be filing a motion to dismiss?*
>
> *MS. GROVE: Yes, sir." (Tr. p. 5, Lines 16-18)*
>
> *"MS. GROVE: I am not, your Honor. Mr. Tabb made a request after the statutory time had already passed, so we haven't had a chance to review the record, which is why you don't have the record before you, because it has to be filed with the Proceedings." (Tr. p. 7, Lines 1-5)*

"MS. GROVE: Yes, but before you get the record we'd like the chance to file a motion to dismiss, because of the jurisdictional question.

THE COURT: Well, I don't know if you're planning to file a motion to dismiss, but they're two independent things. If you file a motion to dismiss I'm going to, you know, Rule 22 and set it down for a hearing and address that issue, but I don't want to hold everything up pending a motion that I may not grant." (Tr. p. 7, Lines 9-17)

"THE COURT: But is it your position that the tape recorder was turned off too?

MR. TABB: Something happened to it. Either that or it was erased.

THE COURT: Well, I guess, I think what we're going to have to do probably is have some kind of an evidentiary hearing and try to find out what happened to the record.

MR. TABB: Yes, your. I also would like to bring to the Court's attention that counsel here is stating the fact that I didn't file this stuff properly within a timely manner.

THE COURT: If they want to pursue that they're going to have to file a written motion. You don't have to answer that today, Mr. Tabb." (Tr. p. 9, Lines 15-24, Tr. p. 10, Lines 1-4)

It was again raised at the hearing on June 19, 2008

THE COURT: So that was also scheduled for today. Okay. Now it would appear that the motion to dismiss being a disparities motion should be heard first. Are you prepared to make your argument in support of that?

MS. GROVE: Yes, your Honor.

THE COURT: All right.

MS. GROVE: The State filed a motion to dismiss based upon the failure of the petitioner to properly file the petition – the appeal with the circuit clerk. The Supreme Court, the West Virginia Supreme Court, has stated that 11-3-25 and 58-3-4 of the West Virginia Code be read in conjunction with each other and 58-3-4 requires that the petition for appeal under 11-3-4 be accompanied by the original record and it requires it to be filed within 30 days of the county commission adjourning from the board of review and equalization. That's very straight forward. In Raw Sales and Processing Company v. The County Commission of Mingo County – this is a 1992 case I believe, 1994, I'm sorry.

THE COURT: Has the Code been amended since that case came down?

MS. GROVE: No, your Honor, it has not.

THE COURT: Is that case factually on all fours with this one?

MS. GROVE: I believe that it is. In that case the same set of facts, the petitioner failed

to file the certified record with the petition and they filed – they did file the record after the petition was filed, but the Court said if it's not accompanied with the original petition then the circuit court shall dismiss and it cannot be the subject of appeal to the West Virginia Supreme Court.

THE COURT: But in that case was the petition filed within the 30 days? (Tr. p. 2, Lines 15-24, Tr. p. 3, Lines 1-24)

During which discussion Petitioner read to the Court verbatim passages of the discussion/argument that took place between Counsel for the State, Petitioner, and the Court on May 12, 2008 wherein the Court concluded the prior hearing with the almost textually identical statement with which it concluded the hearing on June 19, 2008. On May 12, 2008 the Court made the following statement to the parties.

THE COURT: But is it your position that the tape recorder was turned off too?

MR. TABB: Something happened to it. Either that or it was erased.

THE COURT: Well, I guess, I think what we're going to have to do probably is have some kind of an evidentiary hearing and try to find out what happened to the record. (Tr. p. 9, Lines 15-21)

Therefore on June 19, 2008 the Court informed Petitioner that before it would grant the State's motion to dismiss the appeal and deny to Petitioner

his right to a hearing in the Circuit Court, pursuant to W.Va. Code § 11-3-25 the Court would decide if an evidentiary hearing was necessary.

> *THE COURT: I can see how you might have gotten that impression that I wouldn't decide the motion to dismiss until after we had the evidentiary hearing on the record, but in reviewing the motion to dismiss if they're right it moots that whole question of whether the record is complete or not. In other words, they're saying that the record, such as it was, was not submitted with the petition and that's a fatal defect and if that's true, you know, whether the record was complete or not becomes moot. Do you follow me? (Tr. p. 10, Lines 16-24 – Tr. p. 11, Lines 1-2)*

> *THE COURT: It simply should reflect that after reviewing the motion to dismiss the Court felt that it had to be ruled on before anything else was done and at the request of Mr. Tabb I continued the hearing on the motion to dismiss over until the 7th. And with regard to the evidentiary hearing I granted your motion to continue, but I continued it generally pending the outcome of the motion to dismiss. (Tr. p. 12, Lines 18-24, Tr. p. 13, Line 1)*

The final time facts supporting Petitioner's contention that there is a legitimate Federal question to be decided occurred on July 7, 2008 when the Circuit Court dismissed Petitioner's appeal with an evidentiary hearing. See Court's ruling below:

> *THE COURT: Okay. Well, I'm a little bit uncertain about the motion to quash the subpoenas, but I think the better practice would be to hold in abeyance and hear legal argument on the motion to dismiss. And if it appears to me there are questions of fact that are germane to the legal question, then I think I may have to consider allowing an evidentiary hearing, and if I do that, of course, then subpoenas should not be quashed. Okay? (Tr. p. 11, Lines 9-16)*

> *THE COURT: All right. Well, I think I understand the positions of the parties. I'm going to have to do some legal research here, and I'll make a decision and reduce it to writing. And if I determine that I need to take evidence, then I will address the subpoenas issue. Either way, I will address the subpoenas issue in my order. (Tr. p. 32, Lines 6-12)*

It is Petitioner's contention that from the above quoted portions of the transcript of the July 7, 2008 hearing the Circuit Court retreated from its earlier position that before it would rule on the State's motion to dismiss Petitioner's appeal without a hearing, the Court would receive evidence as to why Petitioner was unable to provide the record below when he filed his petition for appeal. The Court instead ruled that Petitioner was not entitled to an appeal or hearing without first providing to your Petitioner the opportunity to present to the Court facts and evidence which are the foundation of his argument that the IMPOSSIBILITY DOCTRINE

justifies and supports Petitioner's failure to supply the "record below". It is the Courts erroneous and legally incorrect decision to deny to Petitioner his right to an appeal pursuant to W.Va. Code 11-3-25 that denied Petitioner his right to due process of law.

ARGUMENT

A. Were the actions of the Circuit Court of Jefferson County, West Virginia and thereafter the West Virginia Supreme Court of Appeals a violation of Petitioner's Fifth Amendment right to Due Process of Law when the Circuit Court dismissed without a hearing Petitioner's appeal of the decision of the Jefferson County Commission sitting as a Board of Review and Equalization, which decision increased Petitioner's 2008 Real Estate Tax Assessment, and thereafter when the Supreme Court declined to exercise its discretionary review of said Circuit Court order dismissing Petitioner's appeal.

Your Petitioner relies on the following decisions of this Court to wit; *Arnnett v. Kennedy,* 416 U.S. 134, 94 S.Ct. 633, 40 L.Ed. 2d 15 (1974) and *Evitts v. Lucey,* 469 U.S. 389, 105 S.Ct. 803, 83 L.Ed. 2d 821 (1985) to support his argument that the action of the Circuit Court of Jefferson County West Virginia dismissing Petitioner's statutory right to appeal pursuant to West Virginia Code 11-3-25 was a violation of

the Petitioner's right to due process of law pursuant to the Fifth Amendment of the United States Constitution;

In 1974 in *Arnett v. Kennedy, supra*, this Court in a plurality recognized:

> It seems to me that this approach is incompatible with the principle laid down in Roth Sinderman. Indeed, it went directly to the conclusion that whenever the nature of an individual's statutorily created property interest, deprivation of that interest could be accomplished without notice or a hearing at anytime. This view misconceives the origin of the right to procedural due process. That right is conferred not by legislative grace, but by constitutional guarantee. . . . As our cases have consistently, recognized, the adequacy of statutory procedures for deprivation of a statutorily property interest must be analyzed in constitutional terms . . . having determined that the constitutional guarantee of procedural due process applies . . . the question arises whether an evidentiary hearing, including the right to present favorable witnesses and to confront and examine adverse witnesses, must be accorded for removal. 416 U.S. at 167.

This Court went on to hold that:

> The past cases of this Court uniformly indicate that some kind of hearing is required at sometime before a person is finally deprived of his property interest. 416 U.S. at 178.

Petitioner believes the follow language from *Arnett v. Kennedy, supra*, is most supportive of his position:

> While these cases indicate that the particular interest involved might not have demanded a hearing immediately, they also reaffirm the principle that property may not be taken without a hearing at sometime. 416 U.S. at 179.

In *Evitts v. Lucey, supra*, this Court held:

> The right to appeal would be unique among state actions if it could be withdrawn without consideration of applicable due process norms. For instance, although a state may choose whether it will institute any given welfare program it must operate whatever programs it does establish subject to the protections of the due process clause . . . in short, when a State opts to act in a field where it's action has significant discretionary elements, this must none the less accord . . . with the Due Process Clause. 469 U.S. at 400, 401.

In further support of his position the Petitioner would also recite United States District Court cases upon which he also relies and which discuss *Evitts v. Lucey, supra*, and other decisions from this Court which recognized that one's Fifth Amendment right to due process of law is violated when they are denied their statutory right to a hearing.

In *Bell v. Robert,* 402 F. Supp. 938 (N.D. Illinois 2005) the Court held as followings:

> In order to demonstrate a due process violation, Petitioner must demonstrate both the existence of a state law providing for a direct appeal as a matter of right and state action depriving him of due process of law. (Precedent teaches that a criminal defendant has no constitutional right to a direct appeal. *See Evitts v. Lucey,* 469 U.S. 387, 393, 105 S.Ct. 830, 83 L.Ed. 2d 821 (1985); accord, e.g. *McKane v. Durston,* 153 U.S. 684, 14 S.Ct. 913, 38 L.Ed. 867 (1894). However, once a state provides for an appeal as a matter of right, it cannot deprive a person of the right of appeal without due process of law. *See Evitts,* 469 U.S. at 393, 105 S.Ct. 830, 402 F. Supp. 2d at 944.

In *U.S. v. Mack,* 311 F. Supp. 1230 (S.D.N.Y. 1970), the U.S. District for the Southern District of New York held:

> Mack contends that the Board's failure to reopen deprived him of a right basic to due process-and that under the holdings of *Blalock v. United States,* 247 F.2d 615, 619 (4th Cir. 1957), *Sobeloff, J., and United States v. Burlich,* 257 F. Supp. 906, 911 (S.D.N.Y. 1966). Weinfeld, J., the court may invalidate a prosecution where there has been a denial of basic procedural fairness. Had Mack's classification been reopened, he would have been entitled, under 32 C.F.R. §§ 1625.11-1625.13, to appeal his new

> classification, whereas as the application was handled here he was unable to appeal the 1-A classification upon which his Order to Report for Induction was premised. 311 F. Supp. at 1232.

The Court went on to hold:

> In view of my conclusion that Mack's letter required the Board to reopen his classification failure to do so deprived him of his crucial right to appeal . . . 311 F. Supp. at 1234 thus granting his motion for judgment of acquittal.

From these cases, your Petitioner believes that he has demonstrated a legal basis to support his argument that the denial to him in both the Circuit Court of Jefferson County, West Virginia and in the Supreme Court of West Virginia of his right to appeal the ruling of the Jefferson County Commission as set forth in its letter of February 10, 2008 violated his fundamental right to due process of law pursuant to the Fifth Amendment to the U.S. Constitution. Petitioner acknowledges however as his claim that his right to due process of law was violated is contingent upon his ability to demonstrate that it was through no fault of your Petitioner that he was unable to provide to the Circuit Court of Jefferson County the record below when he filed Petition for Appeal.

B. Was it a violation of Petitioner's Fifth Amendment right to due process of law for the Circuit Court of Jefferson County, West Virginia to refuse Petitioner an opportunity to present evidence at an *evidentiary hearing* as to the reasons why he was unable to attach to his Petition for Appeal the record of the hearing that was conducted before the Jefferson County Commission sitting as a Board of Review and Equalization; at which evidentiary hearing Petitioner intended to offer evidence that he was unable to attach to the Petition for Appeal, the record below because of intentional interference by agents of the State of West Virginia making it impossible to compile and attach said record to his petition.

The second basis of Petitioner's Due Process argument is that had the Circuit Court of Jefferson County allowed him the evidentiary hearing that due process requires, but which was denied to Petitioner prior to the Court granting the State's motion to dismiss his appeal, he would have raised the DEFENSE/DOCTRINE of IMPOSSIBILITY to explain why he was unable to meet the requirements of *Rawl Sales v. County Commission Mingo County,* 443 S.E. 2d 595, 191 W.Va. 127 (1994) Petitioner avers had he been afforded the evidentiary hearing to which he was entitled he would have presented evidence demonstrating *that* agents of the State of West Virginia intentionally interfered with his

ability to compile and file with his petition for appeal the record below as required. Petitioner relies on the language from following cases to support his position that the uncontemplated intentional interference with his efforts to obtain and file the required "record below" excuse his failure to have complied and filed said record. The West Virginia Supreme Court of Appeals discussed the doctrine of impossibility in *Waddy, IV v. Riggleman, III,* 606 S.E. 2d 222, 216 W.Va. 205 (2004):

> In modern times, the rule of impossibility has undergone further relaxation. As one commentator has explained: The law of impossibility has evolved through two rules. Early cases settled upon a strict rule of impossibility: . . . If a contract became impossible to perform and the parties had failed to anticipate that eventuality, then the chips fall where they may, despite serious hardship to one party. Later cases moved away from this rigid viewpoint, settling on a more equitable rule of impracticability that entertained the excuse of impracticability under certain unanticipated circumstances . . . where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non occurrence of which was a basic assumption of which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary. 606 S.E. 2d at 230.

Petitioner would next cite the language from the follow decisions of this Court that support his argument that unanticipated and uncontemplated intentional interference with his efforts to obtain and file the required "record below" by agents of the State of West Virginia should excuse his failure to have done so. This Court in *U.S. v. Winstar Corp.*, 518 U.S. 839 (1996). This Court held:

> See also Farnsworth on Contracts section 9.6, at 543-544 (listing four elements of the impossibility defense) thus, since the object of the sovereign acts is to place the government as contractor on par with a private contractor in the same circumstances *Horowitz*, 267 U.S., at 461, the Government, like any other defending party in a contract action must show that the passage of the statute rendering its performance impossible was an event contrary to the basic assumptions on which the parties agreed. . . .

This Court next held in *City of Sherrill, N.Y. v. Oneida Indian Nation of New York*, 544 U.S. 197 (2005):

> In this case, the court of appeals concluded that the "impossibility" doctrine had no application because OIN acquired the land in the open market and does not seek to uproot current property owners. 337 F.3d at 157. But the unilateral reestablishment of present and future Indian Sovereign Control, even over land purchased at the market

> price who had disruptive practical consequence similar to those that lead this Court in Yankton Sioux to initiate the impossibility doctrine. 544 U.S. at 219.

Petitioner also relies on two decisions, one from the 7th Circuit Court of Appeals and one from the 4th Circuit Court of Appeals. In *Wisconsin Electric Power Company v. Union Pacific Railroad Company*, 557 F.3d 504 (7th Cir. 2009) the Court held:

> The doctrine of impossibility and the common law of contracts excuses performance when it would be unreasonably costly (and sometimes downright impossible) for one to carry out its contractual obligations. If the doctrine is success invoked, the contract is rescinded without liability. The standard explanation for the doctrine is that nonperformance is not a breach if it is caused by a circumstance "the non-occurrence of which was a basic assumption of which the contract was made" . . . 557 F.3d at 505.

In *Opera Company of Boston, Inc. v. The Wolf Trap Foundation for the Performing Arts*, 817 F.2d 1094 (4th Cir. 1987) the court held:

> Manifestly the first fact to be established in making out this modern defense of impossibility or impracticability of performance is the existence of an "occurrence of an event, the non-occurrence of which was a basic assumption on which the contract was made . . . The occurrence . . . must be unexpected but does not necessarily have to have been

> unforeseeable. A requirement of absolute non-foreseeable as a condition to the application of the doctrine would be so logically inconsistent that in effect it would nullify the doctrine. 817 F.2d at 1000-1001.

Based on this argument, Petitioner believes these above cases and in particular the language from *Wisconsin Electric Power Company v. Union Pacific Railroad Company, supra*, support his argument that a party to an appeal from a county agency to the Circuit Court of the County, should not be expected to anticipate the intentional interference from which your Petitioner alleges he suffered. Petitioner submits that when his attempt to file his appeal to the Circuit Court was subverted by agents of the State whose intentional interference caused the Circuit Court to dismiss his appeal due to his alleged failure to comply with a procedural rule any such failure to comply should have been excused.

Petitioner believes his right to due process of law was twice violated; initially when the Circuit Court of Jefferson County refused to permit Petitioner an evidentiary hearing to allow Petitioner to offer facts and evidence to support his less than articulate proffer as to what he believed was intentional interference by agents of the State of West Virginia as to why no record below was filed with his petition for appeal and thereafter as discussed in Argument VI-A. (See Petitioner's attempted proffer at the hearing on June 19, 2008 Tr. pp. 5-10 as well as the statement of the Circuit Court of Jefferson County to Petitioner

hearing June 19, 2008 Tr. p. 10, Lines 16-21) Petitioner would ask this Court to follow the rationale of *Roell v. Withrow,* 538 U.S. 580 (2003) and *Archer v. Warner,* 538 U.S. 314 (2003) when considering Petitioner's argument that this Court should consider evidence outside the limited record below in deciding whether Petitioner's Fifth Amendment right to due process of law was violated.

CONCLUSION

The Court should grant the petition for a writ of certiorari and reverse the decision of the Twenty Third Circuit Court of Jefferson County, West Virginia, and proceed with the evidentiary hearing ordered on May 12, 2008 with the *Rawl Sales* no longer in control.

Respectfully submitted,

DAVID C. TABB, Pro se petitioner
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IN THE CIRCUIT COURT OF JEFFERSON COUNTY, WEST VIRGINIA

Shenandoah Sales & Service, Inc.,

Petitioner,

Case No. 08-C-121

vs.

Mary R. Bordier, Assessor,

Respondent.

ORDER

THIS MATTER came on for a decision this 10th day of July, 2008 upon the Respondent's Motion to Dismiss which was argued before this Court on July 7, 2008. After hearing argument the Court took this matter under advisement to review the record and research the applicable law.

The Respondent's motion is predicated upon Syllabus Point 3 of *Rawl Sales & Processing Co. v. County Commission of Mingo County,* 191 W.Va. 127. Indeed, it appears from a review of the case file that Petitioner failed to file the original record of the proceeding with the Petition. It further appears that the original record was not thereafter filed within the mandatory 30-day period. Upon a review of the cases, and after "shepardizing" *Rawl,* it appears that Syllabus Point 3 has not been overruled or modified, and this Court cannot distinguish the circumstances of this case from the circumstances in *Rawl,* so the

ruling of the Supreme Court of Appeals in *Rawl* may be controlling and dispositive.

Petitioner appears to concede that *Rawl* would require a dismissal, but argues that *Rawl* has been effectively overruled or modified by the adoption, in January of this year, of the *West Virginia Rules of Procedure for Administrative Appeals.* The Court has researched this possibility. These newly adopted rules "govern the procedures in all circuit courts for judicial review of final orders or decisions from an agency *in contested cases* that are *governed by the Administrative Procedures Act*, W. Va. Code 29A-5 et seq." (emphasis added) The Rules provide some definitions, including: "*Contested Case.*" – A proceeding before a state agency (emphasis added) in which the legal rights, duties, interests or privileges of specific parties are required by law or constitutional right to be determined after an agency hearing, but does not include cases in which an agency issues a license, permit or certificate after an examination to test the knowledge or ability of the applicant where the controversy concerns whether the examination was fair or whether the applicant passed the examination and shall not include state agency rule making or applications for extraordinary remedies; and "*State Agency*" – Any *state government* (emphasis added) board, commission, department, office or, officer authorized by law to adjudicate contested cases, except those in the legislative or judicial branches. Similar language exists relative to the application of the Administrative Procedures Act, to-wit: 29A-1-2(a)

"Agency" means any state board, commission, department, office or officer authorized by law to make rules or adjudicate contested cases, except those in the legislative or judicial branches.

It appears that a County Commission sitting as a Board of Equalization and Review is not subject to the Administrative Procedures Act or the West Virginia Rules of Procedure for Administrative Appeals because it is not a state-level entity, but rather is local. See *Southwestern Community Action Council, Inc. v. City of Huntington Human Relations Commission,* 179 W.Va. 573.

Unfortunately, therefore, this Court must conclude that *Rawl* is controlling. It is this Court's duty to follow precedent. Only the Supreme Court of Appeals can modify or overturn a syllabus point of law.

Accordingly, it is ORDERED that this case be and the same is hereby dismissed and the Motion to Quash Subpoenas, which the Court previously took under advisement, is deemed to be moot.

The Court notes the timely exception of all parties to any and all adverse rulings herein contained.

This is a Final Order from which appeal may be sought to the West Virginia Supreme Court of Appeals.

The Clerk shall forward attested copies hereof to the parties.

[SEAL]

/s/ Thomas Steptoe, Jr.
Judge of the Circuit Court

A TRUE COPY
ATTEST

The Clerk is directed to retire this place it among causes ended.

CLERK CIRCUIT COURT
JEFFERSON COUNTY, W.VA

BY /s/ D. Pittinger
DEPUTY CLERK

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, WEST VIRGINIA

SHENANDOAH SALES & SERVICE, INC.
Plaintiff,

v.

Case No.: 08-C-121
Judge Steptoe

MARY R. BORDIER, ASSESSOR
Defendant.

ORDER

On the 19th day of June, 2008 this matter came on for a hearing upon the Defendant's "Motion to Continue Evidentiary Hearing" and "Motion to Dismiss". The persons present were, Stephanie F. Grove, Assistant Prosecuting Attorney, representing the Defendant, Mary R. Bordier, and David Tabb, representing Shenandoah Sales and Service, appearing pro se.

After review of the Defendant's Motion to Dismiss, the Court found that the same should be ruled upon before any other issues, including those matters relevant to the evidentiary hearing. Mr. Tabb then requested a continuance on the Motion to Dismiss.

Accordingly, it hereby ORDERED that the evidentiary hearing is continued generally, and the hearing on the Motion to Dismiss is continued until July 7, 2008, at 3:15 p.m., at which time the Court

will hear oral argument on the Defendant's Motion to Dismiss,

It is further ORDERED that the Clerk of this Court shall transmit an attested copy of this Order, once entered, to all counsel and parties of record.

Upon receipt of this Order, the Court will hold it for fourteen days to afford the parties the opportunity to file any written exceptions, whereupon the Court will enter this Order as submitted, enter the same as amended or set such further hearing as this Court deems appropriate.

ENTERED: 7/14/08 [SEAL]

/s/ Thomas Steptoe, Jr.
HONORABLE
THOMAS W. STEPTOE, Jr.
JUDGE OF THE TWENTY-
THIRD JUDICIAL CIRCUIT

A TRUE COPY
ATTEST:

PATRICIA A. NOLAND
CLERK, CIRCUIT COURT
JEFFERSON COUNTY, W.VA.

BY /s/ D. Pittinger
DEPUTY CLERK

Prepared by:

/s/ Stephanie F. Grove
STEPHANIE F. GROVE
ASSISTANT PROSECUTOR
West Virginia State Bar Number 9988
Office of the Prosecuting Attorney
Post Office Box 729
Charles Town, West Virginia 25414
304-728-3346 Telephone
304-728-3353 Facsimile

IN THE CIRCUIT COURT OF
JEFFERSON COUNTY, WEST VIRGINIA

SHENANDOAH SALES
& SERVICE, INC.
Plaintiff,

v.

Case No.: 08-C-121
Judge Steptoe

MARY R. BORDIER,
ASSESSOR
Defendant.

ORDER

On the 12th day of May, 2008 came the parties before the Court for the purpose of a status conference. The persons present were, Stephanie F. Grove, Assistant Prosecuting Attorney, representing the Defendant, Mary R. Bordier, and David Tabb, appearing pro se on behalf of the plaintiff, Shenandoah Sales and Service, Inc.

Whereupon, the Court inquired about the status of the case. Mr. Tabb informed the Court that he believed that a portion of the record before the County Commission, sitting as a Board of Review and Equalization had been erased because the webcam video recording was not a part of the record he received. Mr. Tabb also stated that portions of the audio record had been erased. Ms. Grove informed that Court that there was no record of the webcam because the plaintiff declined to have the proceedings broadcast via webcam. Ms. Grove further stated that she could not state whether portions of the audio record were

missing because she had not reviewed the record. Mr. Tabb responded that he believed that the hearing was webcast because members of the public had informed him that they had watched his hearing via the web.

Ms. Grove also indicated her intent to file a Motion to Dismiss because the proceedings were not filed according the process outlined by the relevant statutes and the Supreme Court, which process requires the record to be filed with the proceedings. The Court stated that it would not consider such a motion until properly filed.

Further, before setting a briefing schedule, the Court indicated that an evidentiary hearing was needed to determine whether the County Commission could supply an accurate record of Mr. Tabb's hearing before the Board of Review and Equalization and whether portions of that record had been erased.

Accordingly, it is hereby ORDERED, that this matter come on for an evidentiary hearing on June 19, 2008 at 2:00 p.m. in the Jefferson County Courthouse.

It is further ORDERED that the Clerk of this Court shall transmit an attested copy of this Order, once entered, to all counsel and parties of record.

Upon receipt of this Order by the parties, the Court will hold it for five days to afford the parties the opportunity to file any written exceptions, whereupon the Court will enter this Order as submitted,

enter the same as amended or set such further hearing as this Court deems appropriate

ENTERED: 6/16/08 [SEAL]

/s/ Thomas Steptoe, Jr.
HONORABLE
THOMAS W. STEPTOE, Jr.
JUDGE OF THE TWENTY-
THIRD JUDICIAL CIRCUIT

A TRUE COPY
ATTEST:

PATRICIA A. NOLAND
CLERK, CIRCUIT COURT
JEFFERSON COUNTY, W.VA.

BY /s/ D. Pittinger
DEPUTY CLERK

Prepared by:

/s/ Stephanie F. Grove
STEPHANIE F. GROVE
ASSISTANT PROSECUTOR
West Virginia State Bar Number 9988
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THE COUNTY COMMISSION OF JEFFERSON COUNTY

[LOGO]

P.O. Box 250
124 East Washington Street
Charles Town, WV 25414
www.jeffersoncountywv.org
Phone: 304/728-3284 **Fax 304/725-7916**

February 19, 2008

Mr. David Tabb
Shenandoah Sales & Service
107 Tabb Lane
Harpers Ferry, WV 25425

Dear Mr. Tabb:

The County Commission of Jefferson County, sitting as a Board of Review and Equalization, took up and considered your request for review of the following:

Map 10; Parcel 8 Harpers Ferry District

After review, the Board determined that no change in appraised values should be made at this time.

For the Commission,

/s/ Frances B. Morgan
Frances B. Morgan
President

cc: Mary R. Bordier, Assessor
Board of Review and Equalization File

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 2nd June, 2010, the following order was made and entered;

Shenandoah Sales & Service, Inc., Petitioner Below, Petitioner

vs.) No. 082238

Mary R. Bordier, Assessor, Respondent Below, Respondent

On a former day, to-wit, November 24, 2008, came the petitioner, David C. Tabb, pro se, and presented to the Court his petition praying for an appeal from a judgment of the Circuit Court of Jefferson County, rendered on July 10, 2008, with the record accompanying the petition.

Upon consideration whereof, the Court is of opinion to and doth hereby refuse said petition for appeal.

A True Copy

Attest: /s/ Rory L. Perry II
Clerk, Supreme Court
of Appeals

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 13th of October, 2010, the following order was made and entered:

Shenandoah Sales & Service, Inc., Petitioner Below, Petitioner

vs.) No. 082238

Mary R. Bordier, Assessor of Jefferson County West Virginia, Respondent Below, Respondent

AND

State of West Virginia ex rel. Shenandoah Sales & Service, Inc., Petitioner

vs.) No. 100645

Honorable David Sanders, Judge of the Circuit Court of Jefferson County, Respondent

On former days, to-wit, June 22, 2010 and July 6, 2010, came the petitioner, David C. Tabb, pro se, and presented to the Court his motions in writing for reconsideration and consolidation in the above-captioned petition for appeal and petition for writ of prohibition, for the reasons stated therein.

Upon consideration whereof, the Court is of opinion to and doth hereby refuse said motions.

A True Copy

Attest: /s/ Rory L. Perry II
Clerk, Supreme Court
of Appeals

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

W.Va Code § 11-3-25. Relief in circuit court against erroneous assessment.

Any person claiming to be aggrieved by any assessment in any land or personal property book of any county court above the assessment fixed by the assessor, or who contested the classification or taxability of his property may, at any time up to thirty days after the adjournment of the county court, apply for relief to the circuit court of the county in which such books are made out; but he shall, before any such application is heard, give ten days' notice to the prosecuting attorney of the county, whose duty it shall be to attend to the interests of the state, county and district in the matter, and the prosecuting attorney shall give at least five days' notice of such hearing to the tax commissioner. The right to appeal from any assessment by the county court, as hereinbefore provided, may be taken either by the applicant or by the state, and in case the applicant, by his agent or attorney, or the state, by its prosecuting attorney or tax commissioner, desires to take an appeal from the decision of the county court, the party desiring to take such an appeal shall have the evidence taken at the hearing of the application before the county court. If there was an appearance by or on behalf of the owner before the county court or if actual notice, certified by such court, was given to the owner, the appeal, when allowed by the court or judge in vacation, shall be determined from the evidence so certified. If, however, there was no actual notice to such owner, and no appearance by or on behalf of the

owner before the county court, or if a question of classification or taxability is presented, the matter shall be heard de novo by the circuit court. If, upon the hearing of such appeal, it is determined that any property has been valued at more than its true and actual value, or illegally classified or assessed, the circuit court shall, by an order entered of record, correct the assessment, and fix the property at its true and actual value. A copy of such order or orders entered by the circuit court reducing the calculation shall be certified to the auditor, if the order or orders pertain to real property, by the clerk within twenty days after the entering of the same, and every order or judgment shall show that the prosecuting attorney or tax commissioner was present and defended the interest of the state, county and district. If it be ascertained that any property has been valued too high, and that the owner has paid the excess tax, it shall be refunded to him, and if not paid he shall be relieved from the payment thereof. If it is ascertained that any property is valued too low the circuit court shall, by an order entered of record, correct the valuation and fix it and its true and actual value. A copy of any order entered by any circuit court increasing the valuation of property shall be certified within twenty days, if the order pertains to real property, to the auditor, the county clerk and the sheriff; however, if the order pertains only to personal property, then the copy shall be certified within twenty days to the county clerk and to the sheriff and it shall be the duty of the auditor, the county clerk and the sheriff to charge the taxpayer affected with the increase of

taxes occasioned by the increase of valuation by applying the rate of levies for every purpose in the district where such property is situated for the current year. The order shall also be filed in the office of the auditor and clerk of the county court. Any order disposing of a question of classification or taxability shall be similarly prepared, certified and filed, and the increase or decrease of taxes resulting shall be treated as provided above for changes in valuation. The state or the aggrieved taxpayer may appeal a question of valuation to the supreme court of appeals, if the assessed value of the property is fifty thousand dollars or more, and either party may appeal a question of classification or taxability.

W.Va Code § 58-3-4. Presentation of petition for appeal; when petition must be presented; original record to accompany petition.

In any case in which an appeal lies under section one of this article on behalf of a party to a controversy in a county court, such party may present to the circuit court of the county in which the judgment, order or proceeding complained of was rendered, made or had, or in the vacation of such court, to the judge of such court, the petition of such party for an appeal. Such petition shall be presented within four months after such judgment, order or proceeding was rendered, had or made, and shall assign errors. It shall be accompanied by the original record of the proceeding in lieu of a transcript thereof. Such original record shall be understood as including all papers filed in

the proceeding, certified copies of all orders entered in the proceeding, copies of which are not in the files, and all matters included in bills of exceptions, or certificates in lieu thereof, as provided in section three of this article. The record may likewise include and the court may consider an agreed statement of facts, and, in case the testimony in the proceeding below was not stenographically reported and preserved, a certificate of facts made by such commissioners, or a majority of them.

WHAT IS THE RECORD?

Is it what the Assessor has on file and how the assessment was prepared or what occurred at the Board of Review and Equalization Hearing or what occurred after the Board of Review and Equalization Hearing until a status hearing convened before the Circuit Court Judge? Mr. Tabb believes the record is all three (3) in WV Code 11-3-24 the appeal from the Assessor to the Board of Review and Equalization, the Assessor is to have all the tax records to be reviewed.

So the Court can better understand the impossible defense, Mr. Tabb has prepared an affidavit with the chain of events before, during and after the February 12, 2008 Board of Review and Equalization Hearing.

On ***January 15, 2008***, Mr. Tabb went to the Assessor's office asking for a copy of his property tax records the Assessor said it was against the law to do so. Mr. Tabb left with nothing.

On ***January 16, 2008***, Mr. Tabb returned to the Assessor's office and hand delivered a written request **(Exhibit A)**. After discussion with the Assessor, Mr. Tabb was prepared to call the police to help him obtain his tax records including 2008 Residential Review Document, which is a prepared document. Mr. Tabb requested more tax records. The Assessor still refused until Mr. Tabb was dialing the police on his cell phone, again the *2007 Residential Review*

Document appeared and Mr. Tabb hung up before the police answered. **(Exhibit B)**

On ***January 19, 2008***, Mr. Tabb returned to the Assessor's office to retrieve more information so he could prepare for the Board of Review and Equalization Hearing and only left with a duplicate copy of the 2008 Residential Review Document. **(Exhibit C)** Mr. Tabb decided to argue his case, after being denied his tax information, at the Board of Review and Equalization Hearing.

On ***January 30, 2008***, Mr. Tabb wrote a letter to the Board of Review and Equalization advising them that he was never given the opportunity to research the information that would enable him to defend himself. **(Exhibit D)**

On ***February 12, 2008***, the Board of Review and Equalization convened with the Board asking Mr. Tabb if he wished to have the web cam on or off. Mr. Tabb's response was "ON". Then Mr. Tabb was sworn in, and the hearing proceeded with no record of Shenandoah Sales and Service property tax records present, either by the Assessor or their Counsel. Mr. Tabb argued a residential review document is a proposed assessment for that year, it is not a part of the tax record for that year, so therefore the Board could not uphold the Assessor's request of increase. Mr. Tabb's requests and objections were ignored at every turn. After 20 minutes the Board of Review and Equalization stopped the hearing and voted to deny Mr. Tabb's appeal.

Immediately following the hearing on ***February 12, 2008***, Mr. Tabb requested a copy of the hearing and record at the Assessor's office and then was sent to the Commission's office and they informed Mr. Tabb it would take several days to make the copy, and on February 14, 2008 the Commission's office called and said the records were ready. Mr. Tabb went that same day and all he received was a CD. Mr. Tabb asked "where is the rest of the hearing", the response was, "this is all of it". So Mr. Tabb left and went home to review the CD. Immediately Mr. Tabb noticed the CD was incomplete and there was no DVD of the web cam. Mr. Tabb called the Commission's office and asked where was the web cam portions, the response was "it had to be transferred to the archives before it could be copied". For the next week Mr. Tabb continued trying to get the web cam recording. Mr. Tabb reviewed the Jefferson County Commission's archives on their website. He could see the case before and after his, but Mr. Tabb's hearing was missing. The Commission's office's only comment was "it is gone" and the CD is all they had. Mr. Tabb requested the assistance of the following in retrieving the web cam recording. He called the County Commissioners, Prosecutor Mike Thompson's office, the people that ran the web cam, and the West Virginia State Tax office with no response.

On ***February 25, 2008***, Mr. Tabb asked Governor Manchin **(Exhibit E)** in a letter and many phone calls to help find the record and whether Shenandoah Sales and Service's tax records were confidential. The

Governor did not respond but forwarded this matter to the West Virginia Tax Commission.

On ***March 5, 2008***, the Assistant Prosecuting Attorney Ms. Grove wrote a letter to Mr. Tabb **(Exhibit F)** advising him his tax record was confidential and the Code of Law to back this up. The only problem is Metropolitan Regional Information System vs. Mary R. Bordier, Jefferson County Civil Action 99-C-20 said the tax information is confidential between the Assessor and the property owner.

On ***March 26, 2008***, Mr. Amburgey, Assistant Director Property Tax Division **(Exhibit G)** verified the letter was forwarded from Governor Manchin and they would send someone to assist. No one ever came, even after several phone calls from Mr. Tabb to Mr. Amburgey. There was no assisting or help in this matter.

On ***April 3, 2008*** **(Exhibit H)**, as matter of record Mr. Tabb sent by certified mail requesting the record. This too has fallen into idle hands and deaf ears.

On ***May 12, 2008***, before Judge Steptoe a status hearing was held and Judge Steptoe confirmed the record needs to be verified and scheduled a hearing for June 19, 2008.

On ***May 29, 2008***, Ms. Grove filed a motion to continue and a motion to dismiss.

On ***June 19, 2008***, Judge Steptoe was going to rule on the motion to dismiss when there was a

previous order to verify the record. Mr. Tabb was given until July 7, 2008 to prepare arguments on dismissal.

On ***July 7, 2008***, a third hearing was held. Mr. Tabb argued, still believing the record needs to be verified, but even more considering that the proceedings should be under the WV Administrative Appeal Act. The Court now has to consider the path to take and put the information under advisement and ruled on July 10, 2008, dismissing the case under Raw Sale is in Control.

187

(2)

No. 10-1023

Supreme Court, U.S.
FILED
MAY 11 2011
OFFICE OF THE CLERK

In The

Supreme Court of the United States

DAVID C. TABB, pro se,

Petitioner,

vs.

MARY R. BORDIER, Assessor of
Jefferson County, West Virginia,

Respondent.

**On Petition For A Writ Of Certiorari
To The Circuit Court Of
Jefferson County, West Virginia**

PETITION FOR REHEARING

DAVID C. TABB, Pro se petitioner
107 Tabb Lane
Harpers Ferry, WV 25425
304-676-5976

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PETITION FOR REHEARING

NOW COMES, your Petitioner Shenandah Sales and Service, Inc., a closely held corporation by its vice president and agent, David C. Tabb, pro se, pursuant to Rule 44.2 of the Rules of the United States Supreme Court and moves the Court to reconsider its denial of Certiorari on the grounds and basis that intervening circumstances of a substantial or controlling effect now exist that would militate in the granting of rehearing and ultimately Certiorari.

I. Questions Initially Presented To This Court For Review

Petitioner would first briefly summarize the two issues that were presented for review to this Court in the original Petition to wit:

1. Were the actions of the Circuit Court of Jefferson County, West Virginia and thereafter the West Virginia Supreme Court of Appeals a violation of Petitioner's Fifth Amendment right to Due Process of Law when the Circuit Court dismissed without a hearing Petitioner's Appeal of the decision of the Jefferson County Commission sitting as a Board of Review and Equalization, which decision increased Petitioner's 2008 Real Estate Tax Assessment, and thereafter when the Supreme Court declined to exercise its discretionary review of said Circuit Court order dismissing Petitioner's Appeal.

2. Was it a violation of the Petitioner's Fifth Amendment right to due process of law for the Circuit Court of Jefferson County to refuse Petitioner an opportunity to present evidence at an evidentiary hearing as to the reasons why he was unable to attach to his Petition for Appeal the record of the hearing that was conducted before the Jefferson County Commission sitting as a Board of Review and Equalization at which time Petitioner intended to offer evidence that he was unable to attach to the Petition for Appeal, the record below because of intentional interference by agents of the State of West Virginia making it impossible to compile and attach said record to his Petition?

II. Facts Upon Which Issues Initially Presented For Review Were Based

A. These issues were based on the following facts from the proceedings below:

1. On the 12th day of February, 2008, Petitioner appeared before the Jefferson County Commission acting in the capacity of a State/County Board of Review and Equalization.

2. The purpose of the hearing before the Jefferson County West Virginia Commission acting in the capacity of a Board of Review and Equalization was to determine whether the tax assessment for

the calendar year 2008, increasing Petitioner's assessment from the 2007 Assessment of $259,200 to the 2008 Assessment of $499,000 was conducted properly and the Assessment calculated correctly.

3. Petitioner says at the conclusion of the hearing regarding his Appeal to the Jefferson County Commission acting as a Board of Review and Equalization of the increase real estate tax assessment in the amount of $239,800 said assessment was upheld and his Appeal denied.

4. Petitioner says that he timely filed a Petition for Review of said decision by the Jefferson County Commission acting in the capacity of a Board of Review and Equalization, pursuant to West Virginia Code § 58-3-4 and § 11-3-25;

5. Petitioner says that his Petition for Review and Appeal to the Circuit Court of Jefferson County, from the decision of the Jefferson County Commission acting in the capacity of a Board of Review and Equalization, was denied and refused without a hearing on the merits of his Appeal and same further was denied by the West Virginia Supreme Court of Appeals on both June 2, 2010 and October 13, 2010.

III. Facts Upon Which Petitioner Relies That Intervening Circumstances Of A Substantial Effect Now Exist

A. Petitioner would next set forth the facts upon which he relies to argue to the court in good faith that "intervening circumstances of a substantial or controlling effect . . . that were not previously presented" to wit:

1. Re: In the 2009 Case, No. 09-AA-3, on March 18, 2010 the Circuit Court, the Honorable Judge David Sanders, would not accept any motions or filings without an attorney. This case is still sitting in the Circuit Court with an order, dated April 7, 2010, from the West Virginia Supreme Court to move forward. Judge Sanders has only responded one time since April 8, 2010. Mr. Tabb has made numerous attempts to move this case forward, but to date there has been no response from Judge Sanders. The case still is sitting in the Jefferson County 23rd Judicial Circuit.

2. Re: In the 2010 Case, No. 10-AA-1, the Honorable David Sanders, Judge of the Circuit Court of Jefferson County sent a letter dated April 8, 2010, to Mr. Tabb informing him that he would only continue hearing pleadings and motions through a licensed West Virginia attorney. Judge Sanders dismissed this Case on September 14, 2010 without a hearing ever being scheduled or taking place.

This Case was appealed to the West Virginia Supreme Court on January 12, 2011, to date it has not yet been put on the docket.

3. Re: In the 2011 Case, which was filed March 18, 2011, simultaneous with the filing of the Appeal to the Circuit Court, Petitioner Shenandoah Sales and Service, Inc. by its agent, David C. Tabb, filed a motion to disqualify the Honorable Judge David Sanders, Judge of the Circuit Court of Jefferson County. This case was dismissed on March 23, 2011 before Judge Sanders responded to the Motion to Disqualify. Mr. Tabb reminded the Circuit Court and Supreme Court of the Motion to Disqualify on March 29, 2011 and Judge Sanders responded thereto on March 31, 2011. The West Virginia Supreme Court responded on April 11, 2011 and denied the motion to disqualify Judge Sanders allowing him to again dismiss the Appeal. Petitioner filed Notice of Appeal with the West Virginia Supreme Court on April 21, 2011.

Petitioner submits that although the Jefferson County Circuit Court's legal basis to deny to him a substantive Appeal hearing in the 2008 Appeal from the decision of the Jefferson County Court serving as a BORE was based upon underlying facts different than the underlying fact in the (3) three proceedings referred to above, the ultimate end result is/was a denial to your Petitioner of his right to a substantive

Appeal hearing pursuant to W.V. Code 11-3-25 which violated his Fifth Amendment right to Due Process of Law. Petitioner submits that in all three cases i.e. Case No. 09-AA-3, *Shenandoah Sales and Service, Inc., Petitioner v. Assessor of Jefferson County, WV, Angie Banks*, et al., Respondent; Case No. 10-AA-1, *Shenandoah Sales and Service, Inc., Petitioner v. Assessor of Jefferson County, Angie Banks*, et al., Respondent; Case No. 11-AA-3, *Shenandoah Sales and Service, Inc. v. Assessor of Jefferson County, WV, Angie Banks*, et al., Respondents, the Circuit Court of Jefferson County refused to proceed with each case/or permit, or allow your Petitioner the right to be present at the hearing when the Court determined dismissal of the action was legally appropriate in each case. In Case 10-AA-1, *Shenandoah Sales and Service, Inc., Petitioner v. Angie Banks, Assessor of Jefferson County, WV*, et al., Respondents, the matter lies dormant and idle in the West Virginia Supreme Court and may so remain dormant and idle for as long as Case 08-C-121, *Shenandoah Sales and Service, Inc. Petitioner v. Mary R. Bordier, Assessor of Jefferson County, WV*, Respondents did to wit: from November 6, 2008 until June 2, 2010 which is 574 days after filing the Petition for the Appeal without a reason or explanation.

Petitioner submits the rationale for the Circuit Court of Jefferson County actions in the appeals in 2009-2011 is ever more flawed than this case because pursuant to W.V. Code 11-3-25 a corporation may appear by and through an agent when appealing a

case to a Circuit Court from the action of the Commissioners of the County sitting as a Board of Review and Equalization.

ARGUMENT

Petitioner relies on the following decision of this Court in support of this Petition for Rehearing to wit: *Damasco Vincente Rodriguez v. Florida*, 469 U.S. 1, 105 S.Ct. 308, 83 L.Ed.2d 165, No. 83-1367, Nov. 13, 1984 and *Pan American World Airways, Inc. v. Gondeck*, 382 U.S. 25, 86 S.Ct. 153, 15 L.Ed.2d 21 (1965).

In Gondeck supra, the Court held as follows:

> "On June 11, 1962, we denied certiorari. 370 U.S. 918, 82 S.Ct. 1556, 8 L.Ed.2d 499. On October 8, 1962, we denied a Petition for rehearing. 371 U.S. 856, 83 S.Ct. 17, 9 L.Ed.2d 93. We are now apprised, however, of intervening circumstances of substantial ***effect,'* justifying application of the established doctrine that 'the interest in finality of litigation must yield where the interest of justice would make unfair the strict application of our rules.' *United States v. Ohio Power Co.*, 353 U.S. 98, 99, 77 S.Ct. 652, 653, 1 L.Ed.2d 683. Subsequent to our orders in the present case, the Court of Appeals for the Fourth Circuit upheld an award to the survivors of another employee killed in the same accident. *Pan American World Airways, Inc.*

v. O'Hearne, 335 F.2d 70. In upholding the award, the court cited our decision in *O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504, 71 S.Ct. 470, 95 L.Ed. 483. In a subsequent case the Court of Appeals for the Fifth Circuit itself expressed doubt whether its decision in the present case had been consistent with *Brown-Pacific-Maxon*. *O'Keeffe v. Pan American World Airways*, 338 F.2d 319, 325. The court also noted that, 'The Gondeck case stands alone, except for a per curiam opinion.' Id., at 325. This Court reversed that per curiam judgment last *Term, O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359, 85 S.Ct. 1012, 13 L.Ed.2d 895, so that the present case now stands completely alone.

In *O'Keeffe* we made clear that the determinations of the Deputy Commissioner are subject only to limited judicial review, and we reaffirmed the *Brown-Pacific-Maxon* holding that the Deputy Commissioner need not find a causal relation between the nature of the victim's employment and the accident, nor that the victim was engaged in activity of benefit to the employer at the time of his injury or death. No more is required that the obligations or conditions of employment create the 'zone of special danger' out of which the injury or death arose. Since the Court of Appeals for the Fifth Circuit misinterpreted the *Brown-Pacific-Maxon* standard in this case, and since, of those eligible for compensation from the accident, this petitioner stands alone in not receiving it, 'the interest

> of justice would make unfair the strict application of our rules.' *United States v. Ohio Power Co.*, supra, 353 U.S. at 99, 77 S.Ct. at 653, 1 L.Ed.2d 683.
>
> We therefore grant the motion for leave to file the Petition for rehearing, grant the Petition for rehearing, vacate the order denying certiorari, grant the Petition for certiorari, and reverse the judgment of the Court of Appeals." 382 U.S. at 25, 86 S.Ct. 153, 15 L.Ed.2d 21 (1965).

In *Florida v. Rodriguez*, supra, the court-held as follows:

> "The Florida District Court of Appeal affirmed the judgment in a per curiam opinion, citing its earlier decision in *State v. Battleman,* 374 So.2d 636 (1979). *State v. Rodriguez,* 389 So.2d 4 (1980). This Court originally denied certiorari, *Florida v. Rodriguez,* 451 U.S. 1022, 101 S.Ct. 3015, 69 L.Ed.2d 395 (1981), but two years later granted rehearing and remanded the case to the Florida District Court of Appeal for reconsideration in the light of our opinions in *Florida v. Royer,* 460 U.S. 941, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983). *Florida v. Rodriguez,* 461 U.S. 940, 103 S.Ct. 2115, 77 L.Ed.2d 1298 (1983). The Florida District Court of Appeal again affirmed the suppression of the evidence in a one-word order, 443 So.2d 995 1983), and the State has again petitioned for certiorari." 469 US at 2. In Justice Marshal's dissent he wrote: "Recognizing

that the Florida Supreme Court does not provide a forum for error-correcting review of lower court judgments in that State's judicial system, the Florida Attorney General instead filed a Petition for writ of certiorari in this court. Because the Petition did not present any question of general significance, on May 26, 1981, this Court wisely denied certiorari. *Florida v. Rodriguez,* 451 U.S. 1022, 101 S.Ct. 3015, 69 L.Ed.2d 395. Presumably because they were convinced that error had been committed, three Members of the Court dissented from that disposition and stated that they "would grant certiorari and reverse the judgment." The Attorney General of Florida then filed a timely Petition for rehearing.

Rule 51.2 of this Court's Rules requires that the grounds set forth in a Petition for rehearing "must be limited to intervening circumstances of substantial or controlling effect or to other substantial grounds not previously presented." "The principal ground advanced by Florida in its Petition for rehearing was that a succession of clearly erroneous per curiam decisions of the State district Court of Appeal was having a devastating effect on its prosecutions. As an "intervening circumstance," it noted that the State had filed a Petition for certiorari in *Florida v. Royer,* 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983). In my opinion neither of these grounds satisfied the terms of our Rule. In any event, the Petition for a rehearing remained on the Court's docket for

the next two years." 469 U.S. 1, 105 S.Ct. 308, 83 L.Ed.2d 165 (1984).

CONCLUSION

Petitioner believes in good faith that when the facts and circumstances upon which he relies are considered in light of these two decisions that his request for rehearing pursuant to Rule 44.2 of the Rules of the Supreme Court should be granted.

Respectfully submitted,

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304-676-5976

CERTIFICATION OF GOOD FAITH

Now comes Shenandoah Sales and Service, a closely held corporation, pro se and by its Vice President and agent David C. Tabb and says unto the Court that this Petition for a rehearing is presented in good faith and not for delay.

Shenandoah Sales and Service, Inc.
by its agent, David C. Tabb